Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 24, 2010

Topics In This Issue

Federal Issues

CFPB Transfer Date Set for July 2011; Elizabeth Warren to Lead CFPB Formation Effort. On September 20, 2010, the Treasury Department announced that July 21, 2011 will be the "designated transfer date" on which certain authorities will be transferred to the Bureau of Consumer Financial Protection (the "CFPB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

On that date, among other things, the CFPB will:

- **Receive its full authority to prescribe rules or issue orders pursuant to any federal consumer financial law (as defined in the Dodd-Frank Act);**
- **Officially receive staff transfers from the other agencies; and**
- **Become responsible for the supervision of depository institutions with assets of greater than $10 billion.**

The Federal Register notice also states that, prior to July 21, 2011, the CFPB will begin conducting research on consumer financial products and services, develop its nationwide consumer complaint response center, and begin to plan implementation of its risk-based supervision of nondepository covered persons. In addition, the CFPB is planning a roundtable discussion to begin the process of merging Truth in Lending and RESPA disclosures. The establishment of the "designated transfer date" also locks in the timeline for implementing the Dodd-Frank Act's mortgage reforms contained in Title XIV. For Title XIV provisions where regulations are required to implement the provision, the Board or CFPB must issue its final rules by January 21, 2013. The rules must take effect within one-year of issuance, meaning that compliance with all rules would be required at the latest by January 21, 2014. If the agencies fail to issue implementing regulations, the statutory language will take effect on January 21, 2013.

In addition to announcement of the designated transfer date, the President also appointed Professor Elizabeth Warren of Harvard Law School as Assistant to the President and Special Advisor to the Secretary of the Treasury on September 17 (as reported in InfoBytes, September 17, 2010). Professor Warren was widely regarded as a top candidate to be nominated as Director of the BCFP. Until she took the new position, she was the Chair of the Congressional Oversight Panel (COP) that Congress formed to oversee Treasury's TARP efforts. The COP has issued numerous reports under Professor Warren's leadership. One such report that may provide clues in regard her views and policy preferences is the COP report on the foreclosure crisis. See http://cop.senate.gov/documents/cop-030609-report.pdf. At this point, no Director has been named and it is unclear when the President will formally nominate the Director. In the meantime, Ms. Warren will play the leading role within the administration in standing up the CFPB without having to be confirmed by the Senate. The Federal Register notice announcing the designated transfer date can be found at:http://bit.ly/mcx7I6.

Treasury and CFPB Convene Forum on Revised Mortgage Disclosure Forms. On September 21, Treasury Secretary Tim Geithner and Elizabeth Warren, the newly appointed Assistant to the President and Special Advisor to Geithner, convened a Mortgage Disclosure Forum, composed of representatives from the mortgage industry and consumer groups, housing counselors, and financial literacy experts, to discuss streamlining mortgage disclosure forms to make them more clear and understandable for consumers. The newly created Consumer Financial Protection Bureau (CFPB) is charged under the Dodd-Frank Act with revamping the forms. The Forum was also asked to provide feedback on a discussion draft of a combined disclosure form. The discussion draft merges two previously separate forms that mortgage lenders must provide to borrowers under the Real Estate Settlement Procedures Act and the Truth in Lending Act. The draft was developed by staff at the Federal Reserve Board and the U.S. Department of Housing and Urban Development. For a copy of the disclosure form discussion draft, please see here. For a copy of Treasury's press release about the Forum, please see here.

HUD Issues Volume 2 of its RESPA Roundup. On September 24, the Department of Housing and Urban Development (HUD) published volume 2 of its RESPA Roundup. In this volume, HUD reminded Veterans Administration (VA) lenders that loan applications for VA insured mortgage loans taken on or after October 1, 2010, must include an attachment to the HUD-1 itemizing (a) seller, lender, mortgage broker, or real estate agent/broker credits and (b) title services charges. Additionally, in this volume, HUD resolved questions regarding the disclosure of payments to subordinate lien holders on the HUD-1 by affirming its view that all payments made in connection with a RESPA-covered transaction must be disclosed on the HUD-1/1A Settlement Statement. For a copy of volume 2 of the RESPA Roundup, please see here.

Fannie Mae Rolls Out Second Lien Modification Program Requirements. On September 21, Fannie Mae set forth guidelines concerning its Second Lien Modification Program which was designed to work in conjunction with the Home Affordable Modification Program (HAMP). While there are a number of new detailed requirements, in general, under the new guidelines, when a borrower's first lien is modified under HAMP, the servicer of a Fannie Mae second-lien mortgage must offer to modify the borrower's second lien. In addition, if the first lien is modified under HAMP, any outstanding foreclosure actions on the borrower's second lien must be dismissed. For a full

discussion of the Fannie Mae second lien HAMP program, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1014.pdf.

New Proposed SEC Short-Term Financing Disclosure Rule. On September 17, the SEC voted unanimously to proposed rules requiring public companies to include in their quarterly and annual reports, the average amount outstanding and maximum amount outstanding of their short-term debt obligations during a given reporting period. This is in addition to their pre-existing requirement to disclose the outstanding amount at the end of a reporting period. The proposed rules aim to assist investors with understanding the company's short-term financing activities, ongoing liquidity, and leverage risks in a given reporting period - not just a period-end snapshot. The rules were proposed in response to concerns that companies may be covering up their actual liquidity positions by reducing the amounts of short-term borrowings just before period-end. The rules are similar to provisions for bank holding companies, which have a duty to annually disclose the average and maximum amounts of short-term borrowing. The company's disclosures regarding short-term financing would be presented in the Management's Discussion and Analysis of Financial Condition and Results of Operation section (MD&A) of annual and quarterly reports. For a copy of the SEC press release, please see http://1.usa.gov/delfI6.

HUD and FHA Announce a Second Option for HECM Program. On September 21, the U.S. Department of Housing and Urban Development's (HUD) Fair Housing Administration (FHA) announced a second option in mortgage insurance premiums (MIP) for the Home Equity Conversion Mortgage Program (HECM). The HECM Saver option will lower upfront closing costs for borrowers who want to finance a smaller amount than what would be available with a HECM Standard. The HECM Standard's initial MIP continues to be 2% of the maximum claim amount. Beginning October 4, mortgagors can choose between the HECM Standard and HECM Saver option as an initial MIP. The mortgagee letter also includes guidance regarding (i) the amount of initial and monthly MIP due, (ii) program features for both options, (iii) how to calculate initial MIP for HECM refinance transactions, (iv) accessing new principal limit factor (PLF) tables, (v) changes to FHA Connection, and (vi) the management of pipeline loans. Mortgagees will need to amend legal documents to ensure compliance with the HECM program requirements. For a copy of the mortgagee letter, please see http://1.usa.gov/oJkhcW.

Victims of Data Breach Receive Compensation. On September 22, the Federal Trade Commission (FTC) announced that an administrator working for the FTC is mailing checks to over 14,000 consumers who were victims of a 2008 data breach. The compensation is part of a recent settlement agreement with ChoicePoint, a data aggregation service, as a result of its alleged failure to adequately protect consumers' personal information. ChoicePoint had previously settled charges in 2006 with the FTC relating to a 2005 data breach. As part of that settlement, the company agreed to maintain security and record-handling procedures to prevent unauthorized access to consumers' reports. Despite this settlement order, another breach occurred in 2008. The FTC in the most recent settlement order required the company to compensate affected consumers for any time they may have spent monitoring their credit. For a copy of the FTC press release, please see http://www.ftc.gov/opa/2010/09/choicepoint.shtm.

Global Privacy Enforcement Network Launched. On September 21, the Federal Trade Commission (FTC) announced that it, along with privacy enforcement authorites from 11 other countries, recently launched the Global Privacy Enforcement Network (GPEN) to facilitate cross-border cooperation int he enforcement of privacy laws. The network also revealed its public website, www.privacyenforcement.net, which was designed to promote public awareness of the newly established GPEN. In response to the announcement, FTC Chairman Jon Leibowitz remarked, "To protect consumers' privacy in today's global economy, all of us who work in law enforcement around the world need to cooperate with each other," and "[w]e at the FTC are looking forward to working closely with our colleagues overseas to make this happen." For a copy of the FTC press release, please see http://www.ftc.gov/opa/2010/09/worldprivacy.shtm.

FTC Proposes Rule to Regulate Mortgage Advertising. On September 22, the Federal Trade Commission (FTC) issued a proposed rule to combat deceptive mortgage advertising. Under the proposed rule, the FTC would ban entities involved in the residential real estate market, such as mortgage lenders, mortgage brokers, servicers, real estate agents, real estate brokers, advertising agencies, home builders, lead generators, and rate aggregators, from making material misrepresentations in any commercial communications regarding consumer mortgages. To help covered entities understand the scope of the proposed rule's prohibitions, the FTC has included a list of 19 examples of misrepresentations concerning fees, costs, obligations, and other aspects of credit that would violate the proposed rule. In addition to regulating advertising in the residential real estate market, the proposed rule also would seek to ramp up government enforcement powers by granting both the FTC and the states the authority to seek civil penalties for rule violations. Currently, the FTC can only petition a court for injunctive relief. Banks, thrifts, and federal credit unions, among others, are excluded from the proposed rule's coverage because such entities are generally outside the FTC's jurisdiction. The Commission is seeking comments from the public regarding any potential alternatives to the proposed rule which would adequately protect consumers at a lower cost and whether advertising disclosures should be included in the rule. The public comment period ends November 15, 2010. For a copy of the proposed rule, please see http://1.usa.gov/rfemiC. For a copy of the FTC press release, please see http://www.ftc.gov/opa/2010/09/nprm.shtm.

FTC Settles Deceptive Privacy Pledges Charges Against Online Data Broker. On September 22, the Federal Trade Commission (FTC) announced that it had reached a settlement with an online data broker that charged consumers $10 on the promise that it could "lock their records" so others could not see or buy them. The respondent, US Search, Inc., which compiles public records and sells data about consumers to the public, sold consumers "PrivacyLock," a service it claimed would prevent their names or other information from appearing on the company's website, its search results, or advertisements for one year. The FTC alleged in its complaint that these claims were false and in violation of Section 5 of the Federal Trade Commission Act. The settlement agreement (i) bars respondent from misrepresenting the effectiveness of "PrivacyLock" or similar services, (ii) requires disclosure of limitations of any such services, and (iii) requires the issuance of refunds to consumers who paid for the service. For a copy of the press release, please see http://www.ftc.gov/opa/2010/09/ussearch.shtm.

Mortgage Lender Settles FTC Charges For Violating ECOA. On September 20, the Federal Trade Commission (FTC) announced that it settled charges against Golden Empire Mortgage, Inc. (GEM) and its owner, Howard D. Kootstra, for alleged violations of the Equal Credit Opportunity Act (ECOA). The FTC had alleged that GEM illegally charged Hispanic consumers higher interest rates and up-front charges for mortgage loans than non-Hispanic white consumers. The settlement requires GEM pay $1.5 million to aggrieved customers, adopt a policy restricting loan originators' pricing discretion and implement programs to train employees and to monitor and ensure fair lending compliance. The settlement order also includes a $5.5 million judgment that will be suspended once consumers are redressed. For a copy of the press release, please see http://www.ftc.gov/opa/2010/09/gem.shtm.

GAO Releases Report on Nonprime Mortgages; Testimony on FHA Mutual Mortgage Insurance Fund. On September 23, the U.S. Government Accountability Office (GAO) issued a report on the performance of nonprime loans through December 31, 2009. The report indicates that the number of nonprime loans originated from 2000 through 2007 that were seriously delinquent increased from 1.1 million at the end of 2008 to 1.4 million at the end of 2009. In addition to performance differences between mortgage products, the report notes that changes in housing prices, loan amount, loan-to-value ratios, and the borrower's credit score were among the variables that influenced the likelihood of default. Loans that lacked full documentation of borrower income and assets were more likely to be in default; moreover, borrower race and ethnicity were associated with a probability of default. The GAO noted, however, that, in determining these associations, it did not analyze additional data, such as borrower wealth and first-time homebuyer status, which may influence default rates. Finally, the report notes that the Board of Governors of the Federal Reserve System and Freddie Mac are collaborating on a pilot project to develop a publicly available National Mortgage Database to assist with future loan reporting. For a copy of the report, please see here. For a copy of the GAO summary, please see http://1.usa.gov/aClgia. On September 23, the GAO also released testimony on the financial condition of the Federal Housing Administration's (FHA) Mutual Mortgage Insurance Fund (the Fund). Among other findings, the statement found that (i) a combination of economic and market developments contributed to the Fund's capital ratio recently falling below the statutory minimum, (ii) FHA and its actuarial review contractor have recently enhanced their methods for assessing the Fund's financial condition, (iii) FHA has implemented or proposed measures to improve the financial condition of the Fund (e.g., adjustments to insurance premiums and underwriting policies), and (iv) data on FHA-insured mortgages suggests recent improvements to credit quality at loan origination. For a copy of the testimony, please see here. For a copy of the GAO summary, please see here.

State Issues

Connecticut Launches Program to Protect Consumers and Financial Institutions From Check Fraud. On September 14, the Connecticut Department of Consumer Protection, the Connecticut Department of Banking, and the Credit Union League of Connecticut joined the Consumer Federation of America (CFA) launched a new program to protect consumers and financial institutions from fake check scams. The goal of the program is to educate consumers regarding scams involving counterfeit yet genuine-looking checks or money orders. One example of such a scam involves a check that is described as an "advance" on a large sweepstakes or lottery winning. The consumer receives the counterfeit check and is instructed to send money to pay the taxes on the winnings and claim the

prize. The check then bounces and the victim owes the money back to the financial institution where he deposited or cashed it. In those situations, the average loss to consumers is $3,000 to $4,000. Through the program, CFA will provide brochures to participating banks and credit unions to be made available to consumers who deposit checks or money orders of $1,000 or more or to withdraw $1,000 or more. The brochures are entitled "Don't Become a Target" and are designed to inform consumers that there is no legitimate reason why a person giving them money would need money sent somewhere in return. For a copy of the press release please see http://www.ct.gov/dob/cwp/view.asp?a=2245&q=465786.

Courts

Court Rejects Claims Premised On the Unauthorized Use of Publicly-Available Database Information. On September 15, the U.S. District Court for the Eastern District of Virginiaheld that an event planning company that copied information from a competitor's publicly available online database, and repackaged that information for production on its own website, did not access the information "without authorization." In Cvent Inc. v. Eventbrite Inc., No. 10-481, (E.D. VA. Sept. 15, 2010), the court found that although the activity was prohibited by the website's terms of service, those terms were presented in a "browsewrap agreement" meant to bind all visitors to the website without requiring they agree to the terms, and were not presented prominently enough to be enforceable. The court further explained that even had the terms been enforceable, Eventbrite's access to the information was authorized, though its use may not have been. The court dismissed several of plaintiff's statutory claims, but allowed its Lanham Act and unjust enrichment claims to proceed, in addition to its copyright infringement claims, which were not challenged by the defendant's motion to dismiss. For a copy of the opinion, please see here.

Indiana State Appeals Court Finds That Loan Agreement's Arbitration Clause Survives Bankruptcy. In a recent opinion, the Court of Appeals of Indiana found that a loan agreement and its arbitration clause were not invalid solely because the loan was discharged during the borrower's bankruptcy. Green Tree Servicing, LLC v. Brough, No. 88A01-0911-cv-550 (Ind. Ct. App. July 26, 2010). Borrower-appellee took out a loan from creditor-appellant to purchase a mobile home. The loan agreement contained an arbitration clause requiring any claims between borrower and creditor to be resolved by arbitration rather than jury trial. Borrower subsequently defaulted on the loan and filed for bankruptcy, during which the bankruptcy court discharged borrower's loan with creditor. After the discharge, creditor filed a suit against borrower in state court, and borrower filed a counterclaim against creditor under the Fair Credit Reporting Act (FCRA). By borrower's concession, the FCRA claim would have been covered by the arbitration clause if there was no bankruptcy. The trial court ordered arbitration but subsequently vacated its own order. The Court of Appeals reversed, finding that although the bankruptcy proceedings may have stayed any claims that could be brought under the loan agreement, the agreement and its arbitration clause were again valid once the bankruptcy proceedings terminated. The Court of Appeals remanded the case with instructions to order the parties to arbitrate the FCRA claim. For a copy of the opinion, please see http://1.usa.gov/rcCpgS.

Firm News

Jeff Naimon will be speaking on the Servicing Issues panel at the Mortgage Bankers Association's Regulatory Compliance Conference on September 27. Jonice Gray Tucker will be moderating the Litigation Update Panel.

Jonathan Jerison will be presenting a webinar entitled "Update on Managing HELOCs" on September 29 at 11:00 am CST.

Andrew Sandler will be speaking at the NACHA Council MEGA Meeting on September 30, in Baltimore, Maryland. Mr. Sandler's panel is "A New Regulatory Era for Financial Services - Impacts to the Payments Industry." This panel will focus specifically on the anticipated impact of the creation of the Consumer Financial Protection Bureau and the Durbin amendment. On the panel with Mr. Sandler is Steve Kenneally, Vice President of the American Bankers Association.

Jamie Parkinson will be speaking on the Foreign Corrupt Practices Act at the International Bar Association conference on October 2 in Vancouver.

Jamie Parkinson will present at a US-India Business Council event on October 5 in Palo Alto. The topic will be the Foreign Corrupt Practices Act.

John McGuinness will be speaking at the American Conference Institute's 5th Annual Residential Mortgage Litigation & Regulatory Enforcement conference in Dallas, Texas on a panel entitled "Defending Against the Latest Investor Lawsuits and Claims." Specifically, he will be presenting on major litigation involving credit rating agencies on October 19. Matthew Previn is also on this panel.

Andrew Sandler will be co-chairing the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends in New York City on November 4. David Krakoff and Sam Buffone will also be presenting at the seminar.

Margo Tank and Jerry Buckley will be speaking at the Electronic Signatures & Records Association's Fall Conference on November 9-10.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11:00 am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South in New York City. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Miscellany

Draft Anti-Corruption Guidance Published. On September 14, 2010, the United Kingdom's Ministry of Justice published draft anti-corruption guidance pursuant to the recently-enacted Bribery Act of

2010. Following an eight-week consultation period, the UK government will consider comments and intends to issue final guidance in early 2011, before implementation of the Bribery Act in April 2011. The draft guidance offers counsel and compliance professionals a very helpful overview of current anti-corruption compliance practice, whether or not subject to the jurisdiction of the UK's Bribery Act. Click for information about the draft guidance, please see BuckleySandler's update on the UK Bribery Act—Consultation on "Adequate Procedures" Guidance.

No DOJ Enforcement Action Where Parties Take Steps to Ensure Consultant is Not a "Foreign Official" under FCPA. The Department of Justice (DOJ) recently released a Foreign Corrupt Practices Act (FCPA) Opinion (Opinion) concluding that a proposed consultancy arrangement between a limited partnership pursing an initiative with a foreign government and a consultant representing the same foreign government in other matters did not violate the FCPA because the consultant was not considered a "foreign official." A limited partnership, qualifying as a "domestic concern" under the FCPA, requested an opinion from the DOJ regarding a proposal to engage a consultant to assist the partnership in pursuing an initiative with a foreign government regarding natural resource infrastructure development. The consultant had represented and would subsequently represent the foreign government and act on its behalf in other matters. The DOJ determined that the consultant was not a "foreign official" as that term is defined by the FCPA. The DOJ found that the steps taken by the partnership and the consultant including (i) walling off employees of the consultant working on lobbying efforts on behalf of the foreign government, (ii) providing full disclosure of the relationship to the relevant parties, (iii) conforming the arrangement to local law, and (iv) obligating the consultant not to undertake additional representations of the foreign government during the duration of the consultancy, were sufficient to ensure that the consultant was not acting on behalf of the foreign government. Therefore, the DOJ decided it would not take enforcement action. For a copy of the Opinion Procedure Release, please see http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf.

Accountant Sentenced to 23 Years After Pleading Guilty to Operating a 22-Year Ponzi Scheme. On September 15, the U.S. Department of Justice announced that Frank A. Castaldi, a suburban Chicago accountant and businessman who, as part of a 22-year Ponzi scheme causing losses of more than $30 million, fraudulently promised hundreds of investors between 10 and 15 percent annual interest rates on promissory notes he sold them, was sentenced by the United States District Court for the Northern District of Illinois to a 23-year term of imprisonment. In addition to misrepresenting the expected annual returns on the promissory notes, Castaldi failed to disclose that he was using certain investors' principal payments to make interest payments to other investors. When the Ponzi scheme collapsed in December 2008, Castaldi still owed over $30 million to more than 300 individuals and investor groups. Castaldi was charged in January 2009 after self-reporting his criminal activity, and he pleaded guilty in August 2009 to one count of mail fraud and one count of impeding the Internal Revenue Service in the collection of taxes. Castaldi received the maximum allowable prison term, which was nearly double the sentence recommended by the advisory federal sentencing guidelines. He will begin serving his sentence on November 15. For a copy of the press release, please see http://1.usa.gov/qEjupj.

President of Cash Management Company Pleads Guilty to Fraud. On September 15, Robert Egan, the President of Mount Vernon Money Center (MVMC), pled guilty in the United States District Court for the Southern District of New York to defrauding banks, universities, and hospitals out of more than $50 million. Egan pled guilty to one count of conspiracy to commit bank and wire fraud and six counts of bank fraud. MVMC engaged in various cash management businesses, including replenishing cash in ATM machines, providing armored car services to banks and retailers, and providing payroll services to employers. According to the indictment, Egan and another executive misappropriated large sums of the funds collected from clients to pay MVMC's operating expenses, to repay prior obligations to clients, and to use for their own personal enrichment. In addition, MVMC commingled different clients' money, instead of segregating cash for each client. MVMC is now held in court-appointed receivership, while Egan faces a maximum penalty of 210 years in prison and a maximum fine of more than $100 million. Egan has also agreed to a money judgment of $70 million and to forfeit $19.3 million seized by the Federal Bureau of Investigations (FBI). This case was brought in coordination with President Obama's Financial Fraud Enforcement Task Force. For a copy of the press release, please see http://1.usa.gov/mQYfGZ.

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Consumer Finance

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- Officially receive staff transfers from the other agencies; and
- Become responsible for the supervision of depository institutions with assets of greater than $10 billion.

The Federal Register notice also states that**,** prior to July 21, 2011, the CFPB will begin conducting research on consumer financial products and services, develop its nationwide consumer complaint response center, and begin to plan implementation of its risk-based supervision of nondepository covered persons. In addition, the CFPB is planning a roundtable discussion to begin the process of merging Truth in Lending and RESPA disclosures. The establishment of the "designated transfer date" also locks in the timeline for implementing the Dodd-Frank Act's mortgage reforms contained in Title XIV. For Title XIV provisions where regulations are required to implement the provision, the Board or CFPB must issue its final rules by January 21, 2013. The rules must take effect within one-year of issuance, meaning that compliance with all rules would be required at the latest by January 21, 2014. If the agencies fail to issue implementing regulations, the statutory language will take effect on January 21, 2013.

In addition to announcement of the designated transfer date, the President also appointed Professor Elizabeth Warren of Harvard Law School as Assistant to the President and Special Advisor to the Secretary of the Treasury on September 17 (as reported in InfoBytes, September 17, 2010). Professor Warren was widely regarded as a top candidate to be nominated as Director of the BCFP. Until she took the new position, she was the Chair of the Congressional Oversight Panel (COP) that Congress formed to oversee Treasury's TARP efforts. The COP has issued numerous reports under Professor Warren's leadership. One such report that may provide clues in regard her views and policy preferences is the COP report on the foreclosure crisis. See http://cop.senate.gov/documents/cop-030609-report.pdf. At this point, no Director has been named and it is unclear when the President will formally nominate the Director. In the meantime, Ms. Warren will play the leading role within the administration in standing up the CFPB without having to be confirmed by the Senate.
The Federal Register notice announcing the designated transfer date can be found at:http://bit.ly/mcx7l6.

Connecticut Launches Program to Protect Consumers and Financial Institutions From Check Fraud. On September 14, the Connecticut Department of Consumer Protection, the Connecticut Department of Banking, and the Credit Union League of Connecticut joined the Consumer Federation of America (CFA) launched a new program to protect consumers and financial institutions from fake check scams. The goal of the program is to educate consumers regarding scams involving counterfeit yet genuine-looking checks or money orders. One example of such a scam involves a check that is described as an "advance" on a large sweepstakes or lottery winning. The consumer receives the counterfeit check and is instructed to send money to pay the taxes on the winnings and claim the prize. The check then bounces and the victim owes the money back to the financial institution where he deposited or cashed it. In those situations, the average loss to consumers is $3,000 to $4,000. Through the program, CFA will provide brochures to participating banks and credit unions to be made available to consumers who deposit checks or money orders of $1,000 or more or to withdraw $1,000 or more. The brochures are entitled "Don't Become a Target" and are designed to inform consumers that there is no legitimate reason why a person giving them money would need money sent

somewhere in return. For a copy of the press release please see http://www.ct.gov/dob/cwp/view.asp?a=2245&q=465786.

Securities

New Proposed SEC Short-Term Financing Disclosure Rule. On September 17, the SEC voted unanimously to proposed rules requiring public companies to include in their quarterly and annual reports, the average amount outstanding and maximum amount outstanding of their short-term debt obligations during a given reporting period. This is in addition to their pre-existing requirement to disclose the outstanding amount at the end of a reporting period. The proposed rules aim to assist investors with understanding the company's short-term financing activities, ongoing liquidity, and leverage risks in a given reporting period - not just a period-end snapshot. The rules were proposed in response to concerns that companies may be covering up their actual liquidity positions by reducing the amounts of short-term borrowings just before period-end. The rules are similar to provisions for bank holding companies, which have a duty to annually disclose the average and maximum amounts of short-term borrowing. The company's disclosures regarding short-term financing would be presented in the Management's Discussion and Analysis of Financial Condition and Results of Operation section (MD&A) of annual and quarterly reports. For a copy of the SEC press release, please see http://1.usa.gov/delfl6.

Litigation

Court Rejects Claims Premised On the Unauthorized Use of Publicly-Available Database Information. On September 15, the U.S. District Court for the Eastern District of Virginiaheld that an event planning company that copied information from a competitor's publicly available online database, and repackaged that information for production on its own website, did not access the information "without authorization." In Cvent Inc. v. Eventbrite Inc., No. 10-481, (E.D. VA. Sept. 15, 2010), the court found that although the activity was prohibited by the website's terms of service, those terms were presented in a "browsewrap agreement" meant to bind all visitors to the website without requiring they agree to the terms, and were not presented prominently enough to be enforceable. The court further explained that even had the terms been enforceable, Eventbrite's access to the information was authorized, though its use may not have been. The court dismissed several of plaintiff's statutory claims, but allowed its Lanham Act and unjust enrichment claims to proceed, in addition to its copyright infringement claims, which were not challenged by the defendant's motion to dismiss. For a copy of the opinion, please see here.

Indiana State Appeals Court Finds That Loan Agreement's Arbitration Clause Survives Bankruptcy. In a recent opinion, the Court of Appeals of Indiana found that a loan agreement and its arbitration clause were not invalid solely because the loan was discharged during the borrower's bankruptcy. Green Tree Servicing, LLC v. Brough, No. 88A01-0911-cv-550 (Ind. Ct. App. July 26, 2010). Borrower-appellee took out a loan from creditor-appellant to purchase a mobile home. The loan agreement contained an arbitration clause requiring any claims between borrower and creditor to be resolved by arbitration rather than jury trial. Borrower subsequently defaulted on the loan and filed for bankruptcy, during which the bankruptcy court discharged borrower's loan with creditor. After the

discharge, creditor filed a suit against borrower in state court, and borrower filed a counterclaim against creditor under the Fair Credit Reporting Act (FCRA). By borrower's concession, the FCRA claim would have been covered by the arbitration clause if there was no bankruptcy. The trial court ordered arbitration but subsequently vacated its own order. The Court of Appeals reversed, finding that although the bankruptcy proceedings may have stayed any claims that could be brought under the loan agreement, the agreement and its arbitration clause were again valid once the bankruptcy proceedings terminated. The Court of Appeals remanded the case with instructions to order the parties to arbitrate the FCRA claim. For a copy of the opinion, please see http://1.usa.gov/rcCpgS.

Privacy/Data Security

Victims of Data Breach Receive Compensation. On September 22, the Federal Trade Commission (FTC) announced that an administrator working for the FTC is mailing checks to over 14,000 consumers who were victims of a 2008 data breach. The compensation is part of a recent settlement agreement with ChoicePoint, a data aggregation service, as a result of its alleged failure to adequately protect consumers' personal information. ChoicePoint had previously settled charges in 2006 with the FTC relating to a 2005 data breach. As part of that settlement, the company agreed to maintain security and record-handling procedures to prevent unauthorized access to consumers' reports. Despite this settlement order, another breach occurred in 2008. The FTC in the most recent settlement order required the company to compensate affected consumers for any time they may have spent monitoring their credit. For a copy of the FTC press release, please see http://www.ftc.gov/opa/2010/09/choicepoint.shtm.

Global Privacy Enforcement Network Launched. On September 21, the Federal Trade Commission (FTC) announced that it, along with privacy enforcement authorities from 11 other countries, recently launched the Global Privacy Enforcement Network (GPEN) to facilitate cross-border cooperation in the enforcement of privacy laws. The network also revealed its public website, www.privacyenforcement.net, which was designed to promote public awareness of the newly established GPEN. In response to the announcement, FTC Chairman Jon Leibowitz remarked, "To protect consumers' privacy in today's global economy, all of us who work in law enforcement around the world need to cooperate with each other," and "[w]e at the FTC are looking forward to working closely with our colleagues overseas to make this happen." For a copy of the FTC press release, please see http://www.ftc.gov/opa/2010/09/worldprivacy.shtm.

FTC Settles Deceptive Privacy Pledges Charges Against Online Data Broker. On September 22, the Federal Trade Commission (FTC) announced that it had reached a settlement with an online data broker that charged consumers $10 on the promise that it could "lock their records" so others could not see or buy them. The respondent, US Search, Inc., which compiles public records and sells data about consumers to the public, sold consumers "PrivacyLock," a service it claimed would prevent their names or other information from appearing on the company's website, its search results, or advertisements for one year. The FTC alleged in its complaint that these claims were false and in violation of Section 5 of the Federal Trade Commission Act. The settlement agreement (i) bars respondent from misrepresenting the effectiveness of "PrivacyLock" or similar services, (ii) requires disclosure of limitations of any such services, and (iii) requires the issuance of refunds to consumers

who paid for the service. For a copy of the press release, please see http://www.ftc.gov/opa/2010/09/ussearch.shtm.

Criminal Enforcement Actions

Draft Anti-Corruption Guidance Published. On September 14, 2010, the United Kingdom's Ministry of Justice published draft anti-corruption guidance pursuant to the recently-enacted Bribery Act of 2010. Following an eight-week consultation period, the UK government will consider comments and intends to issue final guidance in early 2011, before implementation of the Bribery Act in April 2011. The draft guidance offers counsel and compliance professionals a very helpful overview of current anti-corruption compliance practice, whether or not subject to the jurisdiction of the UK's Bribery Act. Click for information about the draft guidance, please see BuckleySandler's update on the UK Bribery Act—Consultation on "Adequate Procedures" Guidance.

No DOJ Enforcement Action Where Parties Take Steps to Ensure Consultant is Not a "Foreign Official" under FCPA. The Department of Justice (DOJ) recently released a Foreign Corrupt Practices Act (FCPA) Opinion (Opinion) concluding that a proposed consultancy arrangement between a limited partnership pursing an initiative with a foreign government and a consultant representing the same foreign government in other matters did not violate the FCPA because the consultant was not considered a "foreign official." A limited partnership, qualifying as a "domestic concern" under the FCPA, requested an opinion from the DOJ regarding a proposal to engage a consultant to assist the partnership in pursuing an initiative with a foreign government regarding natural resource infrastructure development. The consultant had represented and would subsequently represent the foreign government and act on its behalf in other matters. The DOJ determined that the consultant was not a "foreign official" as that term is defined by the FCPA. The DOJ found that the steps taken by the partnership and the consultant including (i) walling off employees of the consultant working on lobbying efforts on behalf of the foreign government, (ii) providing full disclosure of the relationship to the relevant parties, (iii) conforming the arrangement to local law, and (iv) obligating the consultant not to undertake additional representations of the foreign government during the duration of the consultancy, were sufficient to ensure that the consultant was not acting on behalf of the foreign government. Therefore, the DOJ decided it would not take enforcement action. For a copy of the Opinion Procedure Release, please see http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf.

Accountant Sentenced to 23 Years After Pleading Guilty to Operating a 22-Year Ponzi Scheme. On September 15, the U.S. Department of Justice announced that Frank A. Castaldi, a suburban Chicago accountant and businessman who, as part of a 22-year Ponzi scheme causing losses of more than $30 million, fraudulently promised hundreds of investors between 10 and 15 percent annual interest rates on promissory notes he sold them, was sentenced by the United States District Court for the Northern District of Illinois to a 23-year term of imprisonment. In addition to misrepresenting the expected annual returns on the promissory notes, Castaldi failed to disclose that he was using certain investors' principal payments to make interest payments to other investors. When the Ponzi scheme collapsed in December 2008, Castaldi still owed over $30 million to more than 300 individuals and investor groups. Castaldi was charged in January 2009 after self-reporting

his criminal activity, and he pleaded guilty in August 2009 to one count of mail fraud and one count of impeding the Internal Revenue Service in the collection of taxes. Castaldi received the maximum allowable prison term, which was nearly double the sentence recommended by the advisory federal sentencing guidelines. He will begin serving his sentence on November 15. For a copy of the press release, please see http://1.usa.gov/qEjupj.

President of Cash Management Company Pleads Guilty to Fraud. On September 15, Robert Egan, the President of Mount Vernon Money Center (MVMC), pled guilty in the United States District Court for the Southern District of New York to defrauding banks, universities, and hospitals out of more than $50 million. Egan pled guilty to one count of conspiracy to commit bank and wire fraud and six counts of bank fraud. MVMC engaged in various cash management businesses, including replenishing cash in ATM machines, providing armored car services to banks and retailers, and providing payroll services to employers. According to the indictment, Egan and another executive misappropriated large sums of the funds collected from clients to pay MVMC's operating expenses, to repay prior obligations to clients, and to use for their own personal enrichment. In addition, MVMC commingled different clients' money, instead of segregating cash for each client. MVMC is now held in court-appointed receivership, while Egan faces a maximum penalty of 210 years in prison and a maximum fine of more than $100 million. Egan has also agreed to a money judgment of $70 million and to forfeit $19.3 million seized by the Federal Bureau of Investigations (FBI). This case was brought in coordination with President Obama's Financial Fraud Enforcement Task Force. For a copy of the press release, please see http://1.usa.gov/mQYfGZ.